

Minimum Requirements for Appraisal Management Companies

Docket No. R-1486

RIN 7100-AE15

On behalf of the Kentucky Real Estate Appraisers Board, members and staff, it is my pleasure to submit the following comments in response to the Agencies request contained within the Federal Register, Vol. 79 No. 68 / Wednesday, April 9, 2014 / Proposed Rules.

The comments presented are made within the context of the language within the Kentucky Real Estate Appraisers Board Appraisal Management Company statutory legislation, as amended and effective on June 25, 2013.

Although I currently serve as the 2013-2014 President of the Association of Appraiser Regulatory officials, the comments I am submitting are not representative of the membership or leadership of that organization. It is expected that each individual jurisdiction, that wishes to do so, will submit a response in regards to how the Proposed Rules might impact the existing or the proposed Appraisal Management Company legislation within each state.

Question 1 – Proposed definition of AMC

The proposed definition of AMC is clear and includes substantially similar requirements for identifying an Appraisal Management Company that is included within the existing Kentucky Real Estate Appraisers Board statute.

There has been discussion that the Agencies proposed definition for Appraisal Management Company might be interpreted to include traditional appraisal firms and offices that contract with or employ real property appraisers.

While the above concern might be legitimate, in some instances, the best method of avoiding that consequence is to advise the state appraiser regulatory agencies to include exemptions of those firms and offices from the requirement to register.

For purposes of effective legislation, there should be a number of services addressed within the definition of Appraisal Management Company, specifically “Appraisal Panel.”

Regardless of the definition agreed upon in the final rule, failure on the part of each individual state to include exemptions, for a variety of individuals and groups, will result in unintended consequences that will likely create egregious harm to the existing “independent fee appraiser” business model that has existed to create the foundation of the real property appraisal profession for decades.

Question 2 – Proposed definition of “appraiser network or panel” and on the alternative of defining this term to include employees as well as independent contractors.

The terms are clear between those that actually perform appraisal services and those who select appraisers to perform appraisal services on the part of a creditor. The definition for “appraisal firms” and “hybrid firms or entities” is also clear, distinguishing between those companies that have both employees to perform appraisals and those who engage independent contractors to perform appraisals being considered an Appraisal Management Company.

The simple definition for an appraiser network or panel is, “a group of independent appraisers who have been selected by an appraisal management company to perform appraisal services for the appraisal management company.” In this instance, the key will be the language used in definitions for Appraisal Management Company, appraisal management services, and the exemptions or exclusions for individuals and groups.

When establishing the definition or the employment structure of “independent contractor,” the IRS publication 1779 provides sufficient clarity and has generally been recognized by courts and regulatory enforcement agencies when debating the matter.

Based upon the above, it is not believed that an additional definition would prove more beneficial.

Question 3 – The Agencies request comment on the distinction the Agencies have drawn between employees and independent contractors as a basis for exclusion of appraisal firms from the definition of an AMC.

The existing definitions that distinguish between individuals who perform appraisal services versus a person or entity that engages the services of others to perform appraisal services is basic and clear. Deciding whether those individuals are employees of an appraisal firm or independent contractors will possibly require different investigations of each state appraiser regulatory agency jurisdiction, including interpretation and possibly enforcement of language in the IRS publication 1779.

Final decision of whether an individual is retained as an employee or independent contractor will require an interpretation of courts and administrative law judgments within the states and territories.

Regardless of the definition language, it should be strictly prohibited for a registered AMC to act as a third party source for an unregistered AMC for purposes of avoiding state registration. In the cases referenced, the registered AMC becomes a third party vendor for the unregistered AMC and fails to report that contract arrangement to the state appraiser regulatory agency.

Question 4 – Should the NCUA and insured credit unions be removed from the definition of ‘Federally related AMC’ and other parts of the final regulation to clarify that AMC CUSOs are subject to State registration and supervision?

The NCUA is recognized as having a seat on The Appraisal Subcommittee, and the state licensed and certified appraisers are contracted for appraisal assignments intended for the NCUA use. Therefore, it appears unreasonable to consider removing a CUSO Appraisal Management Company from the list of federally regulated AMCs, especially if that group is not regulated by the NCUA.

The appraisal services performed by a state licensed or certified appraiser for the regulated entities of the NCUA are no different from those appraisal services performed for the other Agencies. Therefore, the agents of those entities that manage the appraisal services should not be singled for different requirements or be given the status of exemption.

Question 5 – Are the types of entities cited in the proposed definition of “secondary mortgage market participant” appropriately included within the context presented?

Is there any need for more or less clarity?

The definition is clear and needs no further additions or clarifications.

Based upon the proposed language, it is believed that a state appraiser regulatory agency can write sufficient statutes and subsequent rules to enforce the intent.

Question 6 – The Agencies request comment on the proposed minimum requirements for State registration and supervision of AMC’s.

The expectations outlined and described in this section strike at the core of any issue or problem a state appraiser regulatory agency will encounter when initially implementing, revising and ultimately complying with the intent of the minimum requirements for state registration and supervision of AMCs. Each state appraiser regulatory agency will be expected to demonstrate compliance with effective AMC supervision.

The above expectation carries much greater requirement(s) than a registration act. Approximately thirty-eight (38) state appraiser regulatory agency jurisdictions have enacted AMC legislation. Some of those states possibly thought of the legislation as simply a requirement to create a registration data base. However, we now know from reading the proposed rules, the expectation for effective enforcement is much greater than simply providing a method to register as an AMC in a state.

The burden of complying with effective enforcement will require most, if not all, appraiser regulatory agencies to obligate significant expense increases due to additional staff or staff time requirements, and possibly travel requirements necessary to audit and review records, hiring or contracting with legal staff that will be required to shift from the day-to-day appraiser regulatory enforcement duties to that of corporate enforcement. The state agencies will be required to possibly hire or contract with investigators who are knowledgeable and trained to review contracts and perform audits similar to a level that existing financial agency examiners routinely perform. Therefore, the state appraiser regulatory agencies must be provided access to education, and training in the previous mentioned areas. The Agencies are urged to not only specify the list of program reviews and audits, but also discuss the qualifications of individuals needed to comply with the program.

From the date AMC registration and supervision was first announced, there has been confusion about the expectation for compliance with “the AMCs obligations as a creditor’s agent with respect to appraiser compensation pursuant to section 129E(i) of TILA, 15 U.S.C. 1639e(i).

While the proposed rule language, included in the above paragraph is clarified as being directly imposed on federally regulated AMCs, there is no clarity for how the state appraiser regulatory agencies should address the issue, if at all.

The Agencies are urged to please clarify the expectation for enforcement of the section of the TILA cited in this part of the language within the proposed rules Question 6.

It has been said that only the Agencies, the CFPB, the State Attorneys-General, or the Offices of State Financial Institutions are recognized as having the authority to investigate complaints of an AMC for failure to pay customary and reasonable appraisal fees.

If the above is correct, the appraiser regulatory agencies have been removed from the process of receiving and handling complaints of this type. Assuming that to be a fact, it should be made clear and sufficiently addressed in the final rules.

Also, if the above is correct, the agencies should be advised to not accept such complaints, and be given a specific source that will have the authority to receive the complaint.

Regardless of whether the state appraiser regulatory agencies shall be expected to investigate the complaints for failure to pay customary and reasonable fees, it is essential that a mandate for filing the complaints be given the final authority identified to investigate fee complaints. Also, specific authority should be given the states, whether they are given authority to file complaints or not, to procure both an initial fee study and updates when needed that comply with the language within the Dodd-Frank Wall Street Protection and Consumer Protection Act. Those fee studies will be essential for assisting in the adjudication of complaints for failure to pay customary and reasonable fees.

It is not reasonable to expect that 1) without a recognized fee study developed for each state, there can ever be a sufficient process for mediating or settling a complaint of failure to pay customary and reasonable fees, and 2) prior to any group being able to effectively mediate a complaint of this type, the only possible way to achieve an effective settlement will be to compare the AMC fee schedule and reasoning, with a fee study created and continually updated by one of the entities outlined within the Dodd-Frank Wall Street Reform and Consumer Protection Act.

In addition to addressing the customary and reasonable fee issues, the Agencies are urged to include a finite time, as a number of days, considered reasonable from the date an appraiser submits a report to an AMC and the number of days from that date until an AMC submits payment to the appraiser for the completion of the appraisal assignment.

The final rules should also include language that identifies the steps a licensed or certified appraiser must complete from the date an appraisal report is submitted to the client until the payment is received by the appraiser, i.e, correction of information. There must be a clear definition for the meaning of "completion" as it relates to the completion of an appraisal assignment.

Question 7 – The Agencies request comment on the proposed approach to the appraisal review issue.

It is apparent that the Dodd-Frank Wall Street Reform and Consumer Protection Act intended for 100% of the AMC ordered appraisal assignments to be reviewed for USPAP compliance.

While the above is clear, the only definition of appraisal review that is currently codified within most of the state appraiser regulatory agency rules is the one in USPAP. That definition includes, "the act or process of developing and communicating an opinion about the quality of another appraiser's work that was performed as part of an appraisal or appraisal review assignment."

The added comment to the above definition includes, “The subject of an appraisal review assignment may be all or part of a report, workfile, or a combination of these.”

Given the above definition appears in USPAP, there is no doubt that when a state licensed or certified appraiser is engaged to complete an appraisal review assignment, regardless of the term used, that appraiser will most likely be required to do so using Standard Rule 3 as the development and reporting standard.

But, the above assumption cannot be taken as absolute, because confusion has always existed concerning how to define appraisal review. Today, the subject of review has become more critical, not because of the above USPAP definition, but because of other factors, including 1) does the definition within USPAP apply only to state licensed or certified appraisers, 2) when, and if ever, are state licensed and certified appraisers permitted to perform other services, often described as valuation services, outside of appraisal practice, 3) how can a state appraiser regulatory agency be expected to provide meaningful AMC supervision given the many assumptions of exemption from the statutes and rules of state appraiser regulatory agencies, regardless of whether the individuals are state licensed or certified, and 4) how can effective appraiser regulation or AMC regulation be expected in view of the numerous terms and description of services that have been brought into the appraisal arena by AMCs, lenders, profit oriented software and data base companies, and others who contract for appraisal review services.

Some of the more confusing terms for review services include comp check, quality control, technical review, administrative review, comprehensive review, BPO/value check, value reconciliation, tie-out value reconciliation, retrospective value, forensic opinion, and a plethora of compliance review terms.

Many of the above, and other similar uniquely titled services, are now, and have been for some time, routinely performed by real estate sales agents and brokers, and others who are not state licensed or certified appraisers. However, today a greater concern has become known. In satisfying the 100% review requirement, so called appraisal review assignments are being contracted to off shore sub-contractors who are not regulated by any recognized agency or authority.

Often the above review assignments result in a scoring system, commonly called a “score report,” being completed for each review regardless of whether the appraisal under review is completed by a state licensed or certified appraiser who is competent in the market where the subject property of the review is located.

Unfortunately, as a result of the so called “review” services completed by individuals who are not licensed or certified appraisers, otherwise competent appraisers have been “down” graded in the approved list of appraisers or worse, possibly removed from a panel for failure to comply with requirements or expectations outside of minimum USPAP compliance, e.g, in some instances it has been discovered that two primary scoring components include 1) the fee accepted for the appraisal assignment and 2) the time taken from order acceptance until the completion and delivery of the assignment results.

The Agencies are strongly urged to consider final rule language that will address consistent terminology for appraisal review versus a process that might be considered suitable for quality control outside of appraisal practice. Regardless there should be absolute prohibition for any scoring system that includes anything beyond a breach of contract agreement, deficiencies of USPAP, state law and regulations.

Questions 8 & 9 – The combined questions ask about barriers a state may experience in implementing the proposed AMC rules.

As noted earlier, approximately thirty-eight (38) states have enacted AMC registration and supervision statutes and regulations. Until the final rules become effective, it is not known exactly how many of the existing statutes and regulations will require amendment.

The Agencies are urged to consider, and write specifically the expectations for state agencies in regards to AMC oversight compliance, especially in the following areas:

1. Steps in performing audits and reviews of AMC activities;
2. The specific data base that can be used by all agencies for purposes of entering information for registration and tracking AMC registration throughout the US, and
3. Issue a requirement for a unique registration number for each AMC company that is registered by any appraiser regulatory agency in the U.S.

The Agencies are asked to specify the expectations for third party review of the AMC records and policies, i.e., will there be an expectation for verification of timely payment of appraisal fees, and payment of customary and reasonable appraisal fees? Shall the state appraiser regulatory agencies be expected to determine the financial viability of the AMC? If the answer is yes for either, clearly identify the acceptable bench mark or standard that should be used for measuring compliance.

To what depth and degree of review must the state appraiser regulatory agencies use when reviewing the policies of the AMCs for compliance with selecting state licensed and certified appraisers, and what process should a state agency use when making a determination if an appraisal and appraisal report are USPAP compliant.

It is imperative that the Agencies provide sufficient clarity for how a state agency shall determine if the AMC records and files ensure that the measure developed to verify the intent for an acceptable appraisal review process is sufficient.

Guidance must be provided for what processes the AMCs must use to ensure that appraiser qualifications and compliance with Appraisal Independence Requirements (AIR) is adequate. It appears clear that the State must review the AMC's standard for removing an appraiser from an approved panel. However, there is not sufficient clarity for the term "compliance of any contractual review provisions." Is it expected the states will outline acceptable contract terms or will the Agencies issue guidance for a uniform contract language?

The agencies are urged to issue specific date or time line for the frequency a state appraiser regulatory agency should use when reviewing the records of a registered AMC.

Assuming the state agencies shall be expected to collect the ASC roster fee for each appraiser identified on the roster maintained by each AMC registered in a state will prove to be a significant bookkeeping task for the state agency staff. The collection of this fee will prove to be a significantly greater burden for staff than the appraiser national roster fee collected by states today.

The above fee, as currently perceived, will certainly result in a significant unfunded mandate that will prove problematic throughout the U.S. This mandate will be especially troublesome for states that created a registration fee that is not sufficient to fund added staff and staff and carry out the added responsibilities. When collecting fees of any type, most states are required to collect the funds, deposit them into a state agency bank account, request the appropriate payment from a finance branch of government, and submit the state issued payments to vendors, such as the ASC, and daily track the payments through either an internal audit or state audit process.

There has been little mention of the added burden that will be realized by the state agencies when the fees are required to be collected by the state agencies for each registered appraiser identified on the list of approved appraisers for each state registered AMC. It is reasonable to believe that one state credentialed appraiser will appear on the approved list of multiple AMCs, thus the added tracking, collection of fees, monitoring and audit requirements will require constant and consistent cross checking. This process will necessitate increased work time and responsibility, thus possibly creating the need for additional staff or at least see a decline in staff time from other parts of the appraiser regulatory process. This in effect, creates another tier of the unfunded mandate that the registration and regulation of all AMCs will create.

Question 10 – Are there any barriers to a State collecting information on Federally regulated AMCs and submitting such information to the ASC?

Greater clarity and guidance is asked for how a state should collect information for submission to the ASC as it pertains to federally regulated AMCs who elect to not register with a State. As noted above, this rule is also viewed as a significant unfunded mandate for the states. If the information required for collection is necessary for the benefit of other groups, it is strongly recommend the states receive payment or that the burden be placed upon the group that receives benefit from the states collecting and submitting the information and fees. If the states cannot regulate the activities of the federally regulated agencies, why should the responsibility for registration and collection of data be given the states without permitting compensation for doing so?

The agencies are strongly urged to clarify that the states shall have the authority to provide a registration process for federally regulated AMCs, including a fee to be paid the states in an amount sufficient to complete the registration and reporting requirements for federally regulated AMCs.

Also, if the state agencies shall be expected to register federally regulated AMCs, it will be essential for the Agencies to identify that a national registry must be created for the state agencies to use for identifying these AMCs.

The final rules should also include a clear definition for a federally regulated AMC that the states can use when identifying these AMCs for registration.

Question 11 asked if there are any questions raised by any differences between State laws and the proposed AMC rules, and if so, how?

It has been proven through review of the current appraiser regulatory statutes and regulations that each state and territory that initiated a law or regulation did so by drafting a somewhat unique and different licensing program. There is no reason to believe that the continuation of registration and regulation of AMCs will be any different, regardless of the final rules.

Other than those items addressed in the above comments, I am not aware of major differences. Therefore, the Agencies are urged to understand that issues and concerns will often arise during the process of complying with the final rules. The Agencies are urged to understand the need for these differences and provide a process for achieving clarity and solution of those issues and concerns.